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ALEXANDER L. STEVA
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No._____

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

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THE STATE OF TEXAS,

Appellant

V.

KVUE-TV, INC., ET AL.,

Appellees

• • •

On Appeal from
The United States Court of Appeals
for the Fifth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Can Congress preclude state regulation of state and local elections by enacting the Federal Election Campaign Act of 1971 without violating principles of Federalism?

II. By enacting the Federal Election Campaign Act of 1971, has Congress preempted state regulation of state and local elections?

PARTIES TO THE PROCEEDING

The Appellant the State of Texas was Intervenor-Defendant in the District Court and Appellee in the Court of Appeals.

Appellee Margaret Moore, in her official capacity as County Attorney for Travis County, Texas, was Defendant in the District Court and Appellee in the Court of Appeals.

Appellee KVUE-TV, Inc. was Plaintiff in the District Court and Appellant in the Court of Appeals.

Appellees Austin Broadcasting Corp. and Central Texas Broadcasting Co., Inc. were Intervenor-Plaintiffs in the District Court and Appellants in the Court of Appeals.

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JURISDICTIONAL STATEMENT

* * *

Appellant the State of Texas respectfully prays that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit which held a provision of the

Texas Election Code unconstitutional on the ground of preemption by federal statute.

REFERENCE TO REPORTS OF OPINIONS

The memorandum opinion and order of the United States District Court for the Western District of Texas was signed and entered March 18, 1982. The opinion was not published. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 709 F.2d 922.

STATEMENT OF GROUNDS OF JURISDICTION

KVUE-TV, Inc., Austin Broadcasting Corp., and Central Texas Broadcasting Co., Inc., (hereinafter "the Broadcasters") brought this action under 42 U.S.C. §1983 seeking declaratory and injunctive relief that Texas Election Code article 14.09(B)

was preempted by federal statute. Federal jurisdiction was based on 28 U.S.C. §1343. The District Court found that the case was not ripe for judicial review and dismissed it.

On July 18, 1983, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court. The court found that the case was justiciable and that the Texas statute was preempted by federal law.

The State of Texas filed its notice of appeal on September 23, 1983 in the United States Court of Appeals for the Fifth Circuit. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(2).

STATUTORY PROVISIONS

Texas Election Code Ann.

art. 14.09(B) (Vernon Supp. 1982):

> Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising or production matter, shall be fined not more than $100. No advertising medium may charge a rate for political advertising in excess of the following: (1) For advertising broadcast over a radio or television station, including a community antenna or cable television system, the rate charged shall not exceed the lowest unit charge of the station for the same class condition and amount of time for the same period.

Federal Election Campaign Act of 1971, 47 U.S.C. §315(b) (1976):

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election to such office shall not exceed--
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

STATEMENT OF THE CASE

The touchstone of this case is the right of states to regulate state and local elections. Toward that end, the State of Texas enacted in 1975 the Texas Election Code. Article 14.09 of the statute requires broadcasters to charge political advertisers the same rate as their "most favored" commercial advertisers. The intent here was to promote an informed electorate by increasing public exposure of political candidates and issues. The Texas statute extended the protection already afforded political advertising by the Federal Election Campaign Act of 1971 in two ways: it guaranteed "most favored" rates for both candidate and issues advertising, while the federal law protected only candidate advertising; and it guaranteed "most

favored" rates year round, instead of the "window" periods of forty-five days before the primary and sixty days before the election provided by federal law.

In 1981, a local television station brought suit challenging that state law had been preempted by the Federal Act. After a non-jury trial on the merits, the District Court dismissed the Broadcasters' action on the ground that they had not satisfied the requirements of justiciability. The District Court further found that, if it were to consider the merits of the case, it would conclude that the state statute was preempted by federal law only with regard to elections of federal candidates.

The Broadcasters appealed to the United States Court of Appeals for

the Fifth Circuit. The Fifth Circuit found that although Congress did not intend to preclude state regulation of political advertising, the Texas statute had nonetheless been preempted by federal law because the state law stood as an obstacle to the achievement of Congress' purpose to limit campaign spending.

REASONS WHY QUESTIONS ARE SUBSTANTIAL

I. CONGRESS CANNOT PRECLUDE STATE REGULATION OF STATE AND LOCAL ELECTIONS.

It is difficult to conceive of a state interest more compelling than that of regulating its elective process. The Fifth Circuit's holding that states may not regulate their own elections because Congress has regulated federal elections is an affront to our federal system. See, National League

of Cities v. Usery, 426 U.S. 833, 855 (1976) ("Congress may not exercise (its) power so as to force directly upon the State its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.").

In Oregon v. Mitchell, 400 U.S. 112 (1970), this Court held that the 18-year old vote provisions of the Voting Rights Act Amendments of 1970 were constitutional and enforceable insofar as they pertain to federal elections, and unconstitutional and unenforceable insofar as they pertain to state and local elections. In so holding, this Court recognized that:

> No function is more essential to the separate and independent existence of the States and their governments than the power to

> determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id. at 125 (emphasis added) (citations omitted). This Court concluded that:

> Our judgment today gives the Federal Government the power the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgment also saves for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent Amendment has taken from them.

Id. at 134-135.

The State of Texas has enacted the Texas Election Code to provide maximum access to the public of political candidates and issues. The State's interest harmonizes perfectly with the primary purpose of

the Federal Election Campaign Act: to give political candidates access to the broadcast media to explain their stand on issues. KVUE v. Moore, 709 F.2d 922, 935 (5th Cir. 1983) (citations omitted). To the extent that Congress also intended to "limit the cost of campaigning for public office," id. at 935, that limitation can be properly applied only to federal elections. Regulation of state and local elections is reserved to the states and Congress has no legitimate interest in restricting the access to the public of politcal advertisers for state and local elections.

II. CONGRESS HAS NOT PREEMPTED STATE REGULATION OF STATE AND LOCAL ELECTIONS.

The Fifth Circuit correctly recognized that Congress did not intend to preclude state regulation of

political advertising. See, Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). The Federal Election Campaign Act, itself, provides for preemption only for federal elections. 2 U.S.C. §453 provides:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

Thus, Congress has spoken clearly and directly on the question of federal preemption of state statutes. Congress intended to preempt state statutes "with respect to election to Federal office." Congress did not intend for the provisions of the Act to preempt state statutes regulating state and local elections.

Nevertheless, the Fifth Circuit finds preemption because state law is in "conflict" with federal law. Facially, there is no conflict between the Texas Election Code and the Federal Election Campaign Act. The federal statute requires that broadcasters may not charge more than the lowest unit charge to candidates for federal office for forty-five days before a primary and sixty days before an election. At all other times, candidates for federal office may not be charged more than a comparable charge. The state statute applies to candidate elections and to issue elections on a state and local level. It requires that broadcasters charge no more than the lowest unit charge for any such political advertising at any time. The two statutes coordinate beautifully.

Both have as their intent a policy of lowering the cost of political advertisting. The federal statute applies to the only type of elections that exist within the federal system--candidate elections. Because elections to federal office are on a much broader scale than most state or local elections, the federal statute was limited to a certain period of time for the lowest unit charge requirement. State and local elections, on the other hand, are not so broad in scope and may occur at various times during the year, and the Texas legislature accordingly provided for the lowest unit charge for all such advertising. The State's statute is neither repugnant to nor inconsistent with federal law.

Yet, the Fifth Circuit finds preemption because one purpose of the

Federal Act is to "limit the cost of campaigning for public office" and the Texas statute "encourages greater, rather than lesser, campaign spending by encouraging candidates--and others--to advertise year round." First, the Court's conclusion rests on a faulty assumption that lengthened campaign periods result in increased campaign spending. Whether a candidate advertises early in a campaign or later is a matter of campaign strategy and does not necessarily result in increased expenditures. Second, to the extend that increased access to the media is the primary goal of both state and federal law, the statutes are not in conflict.

Recently this Court reviewed the doctrine of preemption in the context of regulating nuclear power.

Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission, ____ U.S. ____, 103 S.Ct. 1713 (1983). Even in a field of as great a national concern as nuclear power, this Court held that sufficient authority had been left to the states "to allow the development of nuclear power to be slowed or even stopped," although directly contrary to the purpose of the Atomic Energy Act to promote the use of nuclear power. Id. at 1732. Surely, here, where the state's interest in regulating its own elections is most compelling and the national interest in shortening the campaign season barely rational, preemption cannot be found.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit and affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of the Jurisdictional Statement of the State of Texas have been served on all parties required to be served by depositing same in the United States Mail, certified, return receipt requested, on this the 14th day of October, 1983, addressed to:

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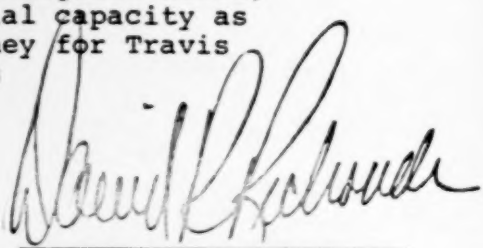

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